UNITED
NATIONS

E

Economic and Social
Council

Distr.
GENERAL

E/C.12/1998/16
29 September 1998

Original: ENGLISH

COMMITTEE ON ECONOMIC, SOCIAL
AND CULTURAL RIGHTS
Nineteenth session
Geneva, 16 November - 4 December 1998
Item 7 of the provisional agenda

GENERAL DISCUSSION: "RIGHT TO EDUCATION
(ARTICLES 13 AND 14 OF THE COVENANT)"

Monday, 30 November 1998

The right to education as a human right: an analysis of key aspects

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GE.98-18419 (E)

Introduction

1. The right to education has a solid basis in international human rights law. It has been laid down in several universal and regional human rights instruments. Examples are the Universal Declaration on Human Rights (art. 26), the European Convention on Human Rights and Fundamental Freedoms (art. 2 of Protocol No. 1), the UNESCO Convention against Discrimination in Education (1960) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) (arts. 13 and 14). 1/ This paper aims at clarifying the normative contents of the right to education and of the corresponding obligations of States. It focuses on the nature, meaning and scope of article 13 of the International Covenant on Economic, Social and Cultural Rights. Occasionally there will be references to other relevant treaty provisions. Section I deals with the nature of the right to education as a human right and its special characteristics. Section II goes into the concept of a core content of human rights, with particular attention to the core content of the right to education. In section III, an effort is made to identify possible violations of the right to education. Section IV discusses the feasibility of using a typology of State obligations ("to respect", "to protect", "to fulfil") in order to specify obligations flowing from treaty provisions and as a mechanism to determine whether a State is complying with its obligations in relation to the implementation of the right to education. Section V identifies a number of justiciable elements of the right to education. Finally, section VI deals with the question of which elements of the right to education could be justiciable.

I. THE SCOPE AND MEANING OF ARTICLE 13 OF THE ICESCR

2. With respect to the right to education as laid down in international documents, two aspects can be distinguished. On the one hand, realization of the right to education demands an effort on the part of the State to make education available and accessible. It implies positive State obligations. This may be called the social aspect. On the other hand, there is the personal freedom of individuals to choose between State-organized and private education, which can be translated, for example, into parents' freedom to ensure their children's moral and religious education according to their own beliefs. From this stems the freedom of natural persons or legal entities to establish their own educational institutions. This is the aspect of freedom. It requires the State to follow a policy of non-interference in private matters. It implies negative State obligations. Both aspects can be found in articles 13 and 14 of the ICESCR. Article 13 (2) and article 14 cover the social aspect, while article 13 (3 and 4) embodies the freedom of education aspect.

3. According to the European Court of Human Rights the right to education may be defined as a right of access to educational institutions "existing at a given time" and the right to draw benefit from the education received, which means the right to obtain official recognition of the studies completed. 2/ When article 13 of the ICESCR was drafted, the UNESCO representative suggested the following definition of the right to education: "The right of access to the knowledge and training which are necessary to full development as an individual and as a citizen", 3/ which is a rather broad and general definition. Both definitions refer to the social aspect of the right to

education. The elements of the freedom of education are well expressed in paragraphs 3 and 4 of article 13: the freedom of choice and the freedom to establish. This aspect of freedom is typical for a democratic, pluralist society; its origin lies in ideas about respect for individual liberty.

4. The right to education laid down in article 13 is a universal right, granted to every person regardless of age, language, social or ethnic origin or other status. Articles 13 and 14 are rather comprehensive in comparison to other rights in the Covenant. They set out the steps to be taken by States in realizing the right to education. This particularly applies to paragraph 2 of article 13, which enumerates the separate steps with a view to achieving the full realization of this right. 4/ At issue here is the specific obligation of the State to make education available and accessible in a non-discriminatory way. In performing this duty, States have a degree of discretion within the norms formulated in article 13 and the key provisions of article 2 (1). An important question here is which obligations may arise from these two provisions. In order to answer this question, an analysis needs to be made of the meaning of the terms "to recognize" and "to respect" which designate the character and scope of the obligations in article 13.

A. The undertaking "to recognize" the right to education

5. The drafting history of the Covenant in general and of article 13 in particular shows that the use of the term "to recognize" is closely linked to the idea of progressive realization. The opening words of the original draft for paragraph 2 of article 13 did not contain the term "to recognize", but rather the expression "it is understood". It was subsequently changed to the clause "The States Parties to the Covenant recognize", in order to have a term with a stronger legal significance. 5/ The meaning of the term "to recognize" was expounded by the representative of UNESCO in 1951 during the preparatory work in the Commission on Human Rights as follows: "recognition meant first and foremost that States should accept the obligation to do all in their power to achieve certain clearly defined aims, without, however, undertaking to attain them in a specified period. Admittedly, they could be achieved only by slow degrees, and the time involved would vary according to the relative magnitude of the problems of each country and the means at its disposal". 6/ In order to stress the progressive nature of the obligation to realize the right to primary, secondary and higher education, the clause "with a view to achieving the full realization of this right" was added. This was believed to be necessary, since it would be unrealistic to expect that States would be capable of realizing these levels of education immediately. 7/ In short, the term "to recognize" does not mean the absence or "soft" character of obligations for States: "Rather recognition triggers the application of general state obligations under Article 2 (1)". 8/ It should be stressed, however, that one should differentiate between subparagraphs 2 (a) (primary education), 2 (b) (secondary education) and 2 (c) (higher education) of article 13. The obligation contained in subparagraph 2 (a) ("Primary education shall be compulsory and available free to all") is unconditional, plainly defined, without a reference to progressiveness. Subparagraphs (b) and (c) contain conjugations of the verb "to make" and this strengthens their character of progressive realization. That the legal obligation contained in subparagraph 2 (a) is stronger can be inferred from article 14 which is devoted to the implementation of compulsory and free primary education for all for States parties that have not yet reached that goal The Committee on

Economic, Social and Cultural Rights attaches great value to the guarantee of compulsory and free primary education. When discussing, for example, the report of Zaire, the Committee made it clear that charging fees for primary education is contrary to article 13, paragraph 2 (a). A State party cannot justify such a measure by referring to severe economic circumstances: "The provision of such education was an obligation which remained incumbent upon a State party whatever economic system it had adopted". 9/

6. It may also be inferred from the drafting history that while primary education was to be compulsory, parents need not necessarily make use of free educational facilities provided by the State. 10/ In addition, the obligation for the State to provide free primary education in public schools does not compel the State to provide also free primary education in private schools. 11/

B. The undertaking "to respect" the freedom of education

7. According to article 13 (3) States parties undertake to have respect for the liberty of parents to choose other than public schools for their children and to ensure the religious and moral education of their children. The same obligation is encountered in other international instruments such as the International Covenant on Civil and Political Rights (art. 18 (4), the European Convention on Human Rights (art. 2 of Protocol No. 1) and the UNESCO Convention against Discrimination in Education (art. 5 (1)(b)). At first sight, this obligation only has a negative meaning, i.e. a prohibition against State interference. From the case law of the Strasbourg supervisory bodies concerning article 2 of Protocol No. 1 to the European Convention, it can be concluded, however, that the obligation "to respect" should be interpreted in a positive sense as well; it requires a positive, tolerant attitude from the State towards the religious or philosophical convictions of parents when a State wants to introduce subjects into the public schools which may interfere with those convictions. 12/ The European Commission, for example, stated: "Article 2 not only prohibits the State from *preventing* parents from arranging the education of their children outside the public schools, but also requires the State actively to respect parental convictions within the public schools. This requirement is then obviously not met simply by the observance by the respondent Government of the prohibition, and by the availability of private schools or alternative means of education other than the public schools". 13/ A positive way to respect parental convictions is, for example, the granting of exemption for certain subjects of the curriculum. It is submitted that the term "to respect" in article 13 (3) of the Covenant has a similar meaning. This interpretation is confirmed by the drafting history of this provision.14/ The character of the obligation "to respect" is such that it ensures a domain which is free from State interference. This type of obligation fits in well with obligations relating to the implementation of civil and political rights, such as the right to privacy and the right to family life. In general, no further measures of implementation are required for it to function in the domestic legal order of States parties. It is of an immediate nature. This interpretation is confirmed by the travaux préparatoires. The use of the term "to undertake" was said to be typical for this immediate obligation. 15/ It may also be concluded from the legal history of this provision that article 13 (3) does not grant to parents an absolute right to determine the curriculum of their children's education. 16/ Finally, the term "liberty" was

expressly chosen over the term "right" in order to ensure that article 13 (3) should not be understood as imposing upon States parties to the Covenant the obligation to provide religious education in public schools. 17/

8. Another element of the freedom of education is the liberty of individuals and bodies to establish and direct educational institutions outside the system of State schools. This element was introduced at a rather late stage of the drafting process. The purpose of it was to add the right to educate which could be seen as complementary to the right to access to education. 18/ Article 13 (4) does not contain the term "to respect", but prohibits the State to interpret article 13 in such a way that it interferes with this liberty, in other words violate such freedom. The functioning of this liberty within the domestic legal order of a State is subject to such minimum standards as may be laid down by the State. It is evident that such standards may not frustrate this freedom. In fact, this paragraph obliges the State in principle to take a similar course of conduct as in the implementation of the obligation "to respect" of paragraph 3.

II. THE CONCEPT OF A CORE CONTENT OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

A. The term "core content"

9. In this section, I intend to make some brief general observations on the concept of the core content of economic, social and cultural rights and some more specific observations on the core content of the right to education. As far as economic, social and cultural rights are concerned, perhaps article 4 of the ICESCR can be of use to render the term "core content" more concrete and workable in practice. This article provides for limitations to the enjoyment of the rights conferred, but imposes criteria for such limitations. They may not, for example, conflict with the nature of a right. In my view, the nature of a right must be understood as meaning its core or essence, i.e. that essential element without which a right loses its substantive significance as a human right. 19/ This idea is also implicit in article 5 (1) of the Covenant which provides, *inter alia*, that limitations of rights to a greater extent than is provided for in the Covenant are not allowed. In fact, therefore, the core content embodies the intrinsic value of each human right. The elements of a right which cannot be regarded as part of its core content (the "peripherals") are no less important, but constitute - as it were - a derivative or consequence of the core content. The character of these elements is such that they can often be realized only gradually; for example, they impose on Governments considerable (financial) obligations, which for many States are not currently achievable. In addition, these peripheral elements are mostly less essential for the very existence of that right as a human right.

10. The core content of a right should be universal; a country-dependent core would undermine the concept of the universality of human rights. If the core of a right has been realized in a rich State without much difficulty, that would not mean that such a State may lean back and argue that it is complying with its treaty obligations. On the contrary, the task would then be to implement the peripheral part of the scope of the right. In other words, the point of departure for a core content approach would be, in my view, the concept of human dignity. The core of a right is to be considered

as a floor, or a bottom from which Governments should endeavour to go up, trying to reach higher levels of realization. Complying with obligations which relate to the core of a right should not be dependent upon the availability of resources. In other words, when a Government is facing policy dilemmas as a result of limited or insufficient financial resources, priority should be given to the realization of the core of a right.

B. Elements of the core content of the right to education

11. In my view, some of the elements which make up the core content of the right to education may be inferred from article 13 of the ICESCR. First, the essence of the right to education means that no one shall be denied a right to education. In practice, this means an individual right of access to available education or, in more concrete terms, the right of access to the existing public educational institutions on a non-discriminatory basis. 20/ An example of a violation of this right is restricting access to the existing public educational institutions to people belonging to a specific ethnic, linguistic or religious group. In addition, education provided for by the State should be of the same quality for all groups in society; girls, for example, should not be given education of an inferior quality compared to boys. 21/

12. A second element of the core content of the right to education would be the right to enjoy basic (primary) education in one form or another, not necessarily in the form of traditional classroom teaching. This would include basic education for adults (literacy courses, basic professional training). Available primary education must be compulsory and free. Primary education is so fundamental for the development of a person's abilities that it can be rightfully defined as a minimum claim. 22/ Providing secondary and other forms of education would belong, in my view, to the periphery. This core element would also mean that no one, for example parents or employers, can withhold a child from primary education. A State has an obligation to protect this right from encroachments by third persons.

13. A third element of the core content of the right to education is free choice of education without interference by the State or a third person, in particular but not exclusively with regard to religious or philosophical convictions. This element would be violated in case a State fails to respect the free choice of parents with regard to the religious instruction of their children. 23/ This means, in practice, that a State must ensure an objective and pluralist curriculum and avoid indoctrination. 24/ This is important because public education entails the danger of political goals, i.e. the most influential "philosophy of life" will be promoted by the State. 25/ However, it should be realized that in many countries there is only limited or no opportunity to follow the education of one's own choice: either there is only State-controlled education or, in a mixed system, private education is too expensive for parents.

14. These three elements undoubtedly constitute the very essence of the right to education as a human right. Violation of one or more of these elements by the State would entail the right losing its material and intrinsic value.

15. A more delicate question is whether the right to be educated in the language of one's own choice is part of the core content of the right to education. In the *Belgian Linguistic Case*, the European Court of Human Rights stated that "the right to education would be meaningless if it did not imply, in favour of its beneficiaries, the right to be educated in the national language or in one of the national languages, as the case may be". 26/ This means that it is the State that determines whether a specific language is to be a national or official language as a medium of instruction in education. In addition, the Court stressed that an individual cannot claim a right to State-funded education in the language of his own choice. The Court rejected positive State action for rewarding such a claim. 27/ On the other hand, it is submitted that a State must respect the freedom of individuals to teach, for instance, a minority language in schools established and directed by members of that minority. This does not imply, however, that a State must allow the use of this language as the only medium of instruction; this would be dependent on the educational policy of the State. As a minimum, however, States must not frustrate the right of members of national, ethnic or linguistic minorities to be taught in their mother tongue at institutions outside the official system of public education. However, there is no State obligation to fund these institutions. This right of members of minorities is solidly established in international law. 28/ It used to be a cornerstone of the minority protection system established under the auspices of the League of Nations. Moreover, the right of minorities to establish, for their own account, educational institutions in which they are entitled to use their own language was characterized by the Permanent Court of International Justice as "indispensable to enable the minority to enjoy the same treatment as the majority, not only in law but also in fact". The Court considered these institutions as "suitable means for the preservation of their racial peculiarities, their traditions and their national characteristics". 29/ It is in this sense that the right to be educated in the language of one's own choice belongs to the core content of the right to education. It is one of the elements of a State's obligation to respect that right.

16. Other elements within the scope of article 13 of the ICESCR would, in my view, not belong to the core content, but could be characterized as peripheral elements. Examples would be the general availability of different forms of secondary education, including vocational guidance and training, and higher education. The same would apply to the progressive introduction of free secondary and higher education. Although these elements are important for the full realization and enjoyment of the right to education, they are less essential from the perspective of the fundamental values which the right to education embodies. In a way, these elements result from the core claim and guarantees of the right to education. Other elements are more remote from the core and thus belong to the edge of the scope of the right to education. These elements would include the introduction and maintenance of an adequate fellowship system, adequate material conditions for the teaching staff and the availability of a coherent overall system of schools at all levels (local, regional and national).

III. VIOLATIONS OF THE CORE ELEMENTS OF THE RIGHT TO EDUCATION

17. In this section, I will attempt to identify some examples of violations of the core elements of the right to education based on a survey (1997 inclusive) of the concluding observations on the implementation of the right to education by States parties adopted by the Committee on Economic, Social and Cultural Rights (CESCR). Because of the absence of a general comment on the right to education and scarce national or international case law, there are hardly any concrete criteria to assess a State's performance in this field. 30/ Therefore, in order to trace violations of the right to education, I will occasionally refer to reports submitted by special rapporteurs of the United Nations Commission on Human Rights as an auxiliary source. Guidelines to identify violations of economic, social and cultural rights were drafted and adopted during an expert meeting convened by the Faculty of Law of Maastricht University, the Urban Morgan Institute for Human Rights, University of Cincinnati, and the International Commission of Jurists in January 1997. The subject of this conference was inspired by the so-called "violations approach" for monitoring the observance of economic, social and cultural rights, proposed by Audrey Chapman in an article in Human Rights Quarterly. 31/ In the survey below, I will use these Maastricht Guidelines for identifying a number of violations of the right to education. 32/

A. Failure promptly to remove obstacles in order to permit the immediate fulfilment of a right (Maastricht Guidelines, paras. 14 (b) and 15 (g))

18. As far as the right to education is concerned, this guideline refers to de jure discrimination in education, as well as to acts which imply forms of active discrimination. An example of de jure discrimination was the educational system during the era of apartheid in South Africa. 33/ Acts of "active discrimination" refer to discriminatory practices which result from a policy evidently intended to originate, maintain or aggravate such practices in education. 34/ Article 1 of the UNESCO Convention against Discrimination in Education lays down a definition of the concept of discrimination within the context of education. In order to eliminate and prevent forms of active discrimination, States parties to this Convention undertake to take specific measures. 35/ It is submitted that these are obligations of conduct which leave little or no discretion to a State; these obligations have an immediate effect. 36/ Some examples can be given which, in my view, amount to a failure by the State promptly to remove obstacles in this field. A number of cases deal with discrimination against girls and women with lower school enrolment and attendance and a lower level of literacy as compared to boys. States have thus failed to take active measures in order to realize equality of treatment between boys and girls with respect to access to education. 37/

19. In some countries, there is discrimination on religious grounds. In the Islamic Republic of Iran, for example, members of the Baha'i minority are denied access to university education. 38/ In one case, the CESCR observed that the Government of a State party had been unable to prevent or had been unwilling to redress discrimination against the Gypsy minority in education. The Government in question had failed to adopt an active non-discrimination policy in order to increase the participation in educational activities of the minority members. 39/ In a number of other countries, a practice emerged to

deny the right to education to asylum seekers because they were considered illegal immigrants. In one case, the CESCR considered this situation inconsistent with the obligations under the Covenant. 40/

B. Failure to implement without delay a right which a State party is required to provide immediately (Maastricht Guidelines, para. 15 (h))

20. A State party is in violation of the Covenant if it fails to implement without delay a right which it is required to provide immediately. In my view, article 13 (2)(a) of the Covenant, which provides for the realization of compulsory and free primary education, is a right which a State party must provide immediately, for the following reasons. The obligation contained in subparagraph 2 (a) is imperative, unconditional, clearly defined and without reference to progressiveness. Subparagraphs 2 (b) and 2 (c), on the contrary, contain conjugations of the verb "to make"; this reinforces their progressive character. 41/ The fact that the obligation of article 13 (2)(a) of the Covenant to provide compulsory and free primary education to all is of an immediate character is also underscored by article 14, discussed above, which requires any State party which has not yet satisfied this obligation to take very precise measures towards that goal. 42/ The CESCR in its General Comment No. 3 also stresses that each State party to the Covenant has a minimum obligation to ensure the satisfaction of minimum essential levels of each right. The Committee adds that if a significant number of people are deprived of, inter alia, the most basic forms of education, the State in question prima facie has failed to discharge its obligations under the Covenant. 43/ As a consequence, States must, as a matter of priority, allocate sufficient financial and other resources to guarantee the right to primary education. If, due to limited financial means, choices must be made between different levels or types of education, priority must be given to the realization of primary education. 44/

21. Some examples may illustrate violations of the right to compulsory and free primary education. According to the United Nations Special Rapporteur on the situation of human rights in Zaire, Mr. Roberto Garretón, only 2 per cent of the national budget is earmarked for education. The (former) Government of Zaire failed to provide free primary education and to maintain schools. It has been reported that about 75 per cent of the school-age population fail to attend school. Authorized private schools lack the minimum infrastructure, but fees for these schools are 5 to 12 times higher than those for State schools. 45/ The Zairian Government abolished free education in order to cope with the economic and financial difficulties it encountered in managing and funding the educational sector. The Government had no plan to reintroduce free education. 46/ After considering Zaire's report on the implementation of articles 13-15, 47/ members of the CESCR were of the view that Zaire's failure to secure primary education free of charge was in contravention of articles 13 and 14 of the Covenant. 48/ One member of the Committee stated that "the provision of such education was an obligation which remained incumbent upon a State party whatever economic system it had adopted". 49/ With regard to the educational situation in Kenya, the CESCR observed that the obligation of article 13 (2)(a) applies in all situations, including those in which local communities are unable to furnish buildings, or where individuals are unable to afford any costs associated with school attendance. 50/ Finally, in a number of States, school enrolment rates and literacy rates are among the

lowest in the world; in some States, vulnerable groups are the victims of the absence of concrete measures by Governments; in a few States, the educational situation has even regressed over a number of years. 51/

C. Wilful failure to meet a generally accepted international minimum standard (Maastricht Guidelines, para. 15 (i))

22. A State party is in violation of the Covenant if it wilfully fails to meet a generally accepted international minimum standard of achievement which it is capable of meeting. With respect to the right to education, some norms may be characterized as minimum standards. These standards partly overlap with elements of the core content of this right. The first minimum standard is the right of access to the existing public educational institutions, in a non-discriminatory way. Another is respect for the free choice of education, for example, between public and private education, or the right of parents to determine the religious and moral education of their children. 52/ A third minimum norm is the right of individuals or groups to establish their own educational institutions, including the right of members of minorities to be taught in their mother tongue at institutions outside the system of public education. A final minimum standard is the requirement that the purposes of educational policy in a given State must be in accordance with the principles of pluralism and respect for human rights as laid down in article 13 (1) of the Covenant.

23. Several examples of violations of these minimum standards can be identified from the consideration of States parties' reports by the CESCR. In the Islamic Republic of Iran, for example, members of the Baha'i and Kurdish minorities were denied the right to education because they belonged to a minority not recognized by the authorities. 53/ After the Islamic revolution in 1979, private education was abolished in Iran; only three minorities were allowed to establish their own schools, namely Jews, Christians and Zoroastrians. 54/ Some members of the CESCR wondered whether there was real free choice of education in a strongly Islamic country. 55/ Consequently, Islam takes a dominant place in the school curriculum.

24. In some countries, the State has a major influence on the contents of education. This is especially so in countries with a one-party system. The ruling party will promote and integrate its political ideas in education. 56/ Pluralism, the rationale behind the freedom of education, will clearly be lacking in such cases. One example was the situation in the former Zaire where all education was provided under the supervision and in conformity with the ideals of the ruling "People's Movement for the Revolution". 57/ This is contrary to the idea that instruction in public schools be given in a neutral and objective way. 58/

IV. A TYPOLOGY OF OBLIGATIONS RELATING TO THE IMPLEMENTATION OF THE RIGHT TO EDUCATION

25. In order to further analyse and specify the normative content of the right to education and the nature and content of the corresponding obligations of the State, I propose to follow the obligations approach adopted by Mr. A. Eide. He identified three levels of obligations with respect to the implementation of the right to food. 59/ He distinguished between the

obligations "to respect", "to protect" and "to fulfil", which States parties to the ICESCR have towards individuals under their jurisdiction. The first level is the "obligation to respect". This obligation prohibits the State itself to act in contravention of recognized rights and freedoms. This means that the State must refrain from interfering with or constraining the exercise of such rights and freedoms. The second level is the "obligation to protect". This requires the State to take steps through legislation or by other means to prevent and prohibit the violation of individual rights and freedoms by third persons. The third level concerns the "obligation to fulfil". This obligation can be characterized as a programme obligation and implies more of a long-term view. In general, this will require a financial input which cannot be accomplished by individuals alone. This typology of obligations is applicable to economic, social and cultural rights as well as to civil and political rights. It demonstrates that the realization of a particular right may require either abstention or intervention on the part of governments. On the basis of Mr. Eide's proposal for a "food security matrix", 60/ it is possible, in my view, to devise a comparable matrix to identify the nature and levels of obligations relating to the implementation of the right to education. The matrix is presented as an appendix to this paper. The matrix distinguishes between the "social" dimension and the "freedom" dimension of the right to education, discussed above. Within each dimension, a further itemization is proposed. The "social" dimension includes the elements of accessibility and availability of education, whereas the "freedom" dimension refers to the liberty to choose and the liberty to establish. The proposed matrix does not offer an exhaustive list of concrete State action, but merely serves as an illustration of possible options for States. Other forms of conduct or measures can be put in, depending on the educational situation in each country. The matrix is applicable to both developing countries with an inadequate educational system and to countries in which there is a highly developed system of education. It is a device for the elaboration of obligations and it can help to determine whether a State's legislation, policy and practice are in conformity with its obligations under the Covenant. The nature of the obligations remains the same; only the measures taken to implement the obligations differ. In rich countries, for example, it is necessary to maintain the existing level of education in a quantitative and qualitative sense, because a drop in services would endanger the accessibility and availability of education.

26. The following examples may illustrate how the matrix can be applied. The obligation "to respect" the right to education requires the State to abstain from interference; it must respect the exercise of individual freedoms without interference. In addition, it requires that the State does not discriminate on the basis of sex or ethnic origin with respect to admission to public schools. Detailed standards of non-discrimination and equal treatment of individuals in education are laid down in the UNESCO Convention against Discrimination in Education, particularly in articles 1 and 3. The obligation "to respect" can be characterized as an obligation of conduct: it requires that the State follows the course of action specified in the treaty provision. 61/ The obligation "to protect" requires the State to guarantee the exercise of the right to education in horizontal relations (between private groups or individuals), for example, it must protect against discrimination in admitting students to private schools. Another example of the obligation to protect would be the adoption of legislation to combat child or bonded labour in private labour relations. The nature of the right to

education is such that positive State action is needed to achieve the full realization of this right. The obligation "to fulfil" requires States to make the various types of education available and accessible for all and to maintain that level of realization. In order to achieve that aim, States must take a variety of measures. Although legislation may be necessary to provide a legal framework, primarily, policy measures, financial and material support are needed to realize this right. 62/ The obligation "to fulfil" implies that States have a substantial degree of latitude in complying. Therefore, this obligation should be characterized as an obligation of result, leaving the choice of means to the State, provided the result achieved meets the international standards. It can also be seen from the matrix that specific obligations correspond to concrete elements of the core content of the right to education. These obligations are not limited to cost-free obligations to respect, but also include obligations to protect and to fulfil. Minimum core obligations resulting from the core content of the right to education apply irrespective of the availability of resources. 63/

V. JUSTICIABLE ELEMENTS OF THE RIGHT TO EDUCATION

27. First of all, it should be emphasized that the right to education laid down in article 2 of Protocol No. 1 to the European Convention is already justiciable in the European region through the individual communications procedure before the Commission and the Court. 64/ In addition, it has been argued that justiciability is "a fluid concept". 65/ This means that the idea that the obligations in the ICESCR in their entirety are merely "promotional" is untenable. 66/ Economic, social and cultural rights are justiciable where specific elements of particular rights are concerned.

28. A similar approach has been adopted by the Committee on Economic, Social and Cultural Rights. In its General Comment No. 3, the Committee lists a number of provisions "which would seem to be capable of immediate application by judicial and other organs in many legal systems". 67/ Among these provisions there are three elements of the right to education; these are article 13 (3), 13 (4) and 13 (2)(a). In my view, these three elements are indeed good candidates for justiciability in many legal systems. Each of these provisions should be considered very carefully with due regard for the details in each case. Paragraphs 3 and 4 of article 13 refer to the freedom aspect of the right to education. They imply negative obligations for the State and do not require substantial financial allocations. They only require limited measures of implementation, for example, legislation, to be effective in the national legal order. These are examples of an obligation "to respect" which prescribes that the State not interfere in these individual freedoms. This is highlighted by the use of the term "liberty" in both paragraphs. Moreover, the language used in these paragraphs is rather precise and prescribes a specific course of conduct for the State. Finally, there is an overlap between article 13 (3) and article 18 (4) of the ICCPR. The element of freedom of religion, i.e. the liberty of parents to ensure the religious and moral education of their children in conformity with their own convictions, is generally believed to be enforceable from the State. Very few States have made reservations with regard to article 13 (3) and (4). Only Congo completely rejects these provisions, because they are "inconsistent with the principle of nationalization of education and with the monopoly granted to

the state in that area". 68/ The Algerian Government stated that article 13, paragraphs 3 and 4, "can in no case impair its right freely to organize its educational system". 69/

29. The justiciability of both freedoms is unquestionable, of course, if a State acts in a discriminatory way, for example, when parents belonging to a specific religion are unable to ensure the religious or moral education of their children, whereas parents who belong to other religions can. Another example would be the case where the law discriminates against specific individuals or groups, prohibiting the enjoyment of these educational liberties. This would constitute a violation of article 2 (2). This provision calls for immediate application, subject, inter alia, to judicial review. Discriminatory legislation must be abolished without delay. 70/ This kind of discrimination may be redressed invoking the principle of equality laid down in article 26 of the ICCPR, as interpreted by the Human Rights Committee in its case law.

30. Another justiciable element of the right to education would be the right of access, without discrimination of any kind, to the public educational institutions existing at a given time, provided the objective requirements of capacity laid down by the State are met by the individual. If a right of access would not be enforceable from a State in national or international proceedings, the right to education would lose its meaning as a human right. If, due to a lack of resources, a State is not able to ensure the right of access to all of its eligible citizens, which would result in de facto discrimination, it has a duty to end that situation as quickly as possible. 71/

31. The right to primary education lends itself, in my view, to justiciability as well, because it is already fully implemented in the national legislations and practices of many countries. With regard to the right to primary education, three observations must be made. According to article 13 (2)(a), primary education shall be compulsory and must be free of charge. This provision is framed in mandatory, explicit terms, leaving the State little or no escape. A second argument for the justiciable character of this element has to do with the obligation to make primary education compulsory. I argue that if an obligation is imposed upon an individual by a State, the concurring right must be enforceable from the State. This would mean that if primary education is compulsory by law, the right of access to public institutions for primary education must be justiciable. In a considerable number of developing countries, however, primary education has been made compulsory by law, but actual practice is that many children are unable to enjoy education because insufficient financial resources are responsible for of a lack of schools, teaching staff, teaching materials or transport facilities. Another factor is the widespread use in many countries of children as cheap labour; unfortunately, many families need this supplementary income to be able to make ends meet. Thirdly, many countries refer to a lack of financial resources to justify that primary education is not yet free of charge. School fees hamper the accessibility of primary education because poor families are unable to pay them. 72/ Some States even feel compelled to abolish already existing free education. Such a measure would seem to be a violation of articles 13 (2)(a) and 2 (1) and suitable for judicial review. Moreover, the paramount importance of compulsory and free

primary education is highlighted in the special provision of article 14. This article reflects the necessity of working out "targeted policies, including the establishment of priorities" 73/, an obligation which is of an immediate character. 74/ When realizing the right to education, States should, on the basis of articles 13 (2)(a) and 14, give priority to the implementation of primary education over other types of education. This would reflect the fundamental importance of primary education for the development of young people and underscore the need for justiciability of this right. 75/ Finally, it should be emphasized here that the availability of domestic remedies relating to (elements of) the right to education would strengthen the justiciability of this right at the international level.

VI. CONCLUDING REMARKS

32. This working paper contains a tentative effort, from a legal perspective, to shed more light on the normative content of the right to education. Contributions from other disciplines are necessary because many activities and measures dealing with the implementation of this right will be of a policy, financial or pedagogical nature. There is a risk that identifying core elements of a right might lead to neglect of peripheral elements of the same right and to an undermining of the universal character of that right. However, it is my opinion that the search for core elements of economic, social and cultural rights serves, first of all, analytical purposes. From a human rights perspective, it is of the utmost importance to clarify (vague) treaty norms in order to make clear to governments what the precise meaning is of treaty obligations that they have accepted voluntarily, and next to scrutinize acts and omissions of governments in terms of observance of these rights and obligations. In addition, it is important to assist monitoring bodies, both at the intergovernmental and non-governmental levels, in their work to identify violations and to request Governments to redress those violations and to alter their legislation and policy-practice. Finally, clarification of rights and obligations in the field of economic, social and cultural rights may contribute to strengthening the justiciability of these rights at the national and international levels. After all, from a perspective of equality, interdependence and indivisibility of human rights, the overall aim should be to strengthen the legal character of economic, social and cultural rights which, unfortunately, have been neglected for too long.

Notes

1/ See also the International Convention on the Elimination of All Forms of Racial Discrimination (art. 5 (e) (v)), the Convention on the Elimination of All Forms of Discrimination against Women (art. 10), the Convention on the Rights of the Child (arts. 28 and 29), the African Charter on Human Rights and Peoples' Rights (art. 17) and the Protocol of San Salvador to the American Convention on Human Rights (art. 13).

2/ *Belgian Linguistic Case*, relating to certain aspects of the laws on the use of languages in education in Belgium. Judgement of the European Court of Human Rights, 23 July 1968, Publications of the Court, Series A, vol. 6, p. 31.

3/ E/CN.4/SR.226, 4 May 1951, p. 14.

4/ This paper does not deal with the aims of education laid down in article 13 (1).

5/ See A/C.3/L.621, A/C.3/L.625 and A/3764 (report of the Third Committee, 1957).

6/ E/CN.4/AC.14/SR.1, 17 May 1951, p. 14.

7/ A/3764 and Add. 1, paras. 33 and 42.

8/ P. Alston and G. Quinn, "The Nature and Scope of States Parties' Obligations under the International Covenant in Economic, Social and Cultural Rights", *Human Rights Quarterly*, vol.9, 1987, p. 185.

9/ E/C.12/1988/SR.19, para. 10; see also E/C.12/1988/SR.17, paras. 27, 40, 41 and 48.

10/ A/2929 (1955), para. 41.

11/ A/C.3/SR.785, para. 17 and A/C.3/SR.787, paras. 51, 53.

12/ See European Commission on Human Rights, case of Kjeldsen, Busk Madsen and Pedersen, report of the Commission of 21 March 1975, Publications of the Court, Series B, vol. 21, p. 46. See also the case of Campbell and Cosans, Judgement of the Court of 25 February 1982, Publications of the Court, Series A, vol. 23, p. 18.

13/ *Kjeldsen, Busk Madsen and Pedersen*, Report of the Commission, p. 44.

14/ E/CN.4/SR.229, p. 26.

15/ E/CN.4/SR.286, pp. 11, 12 and A/C.3/SR.575, para. 31.

16/ A/2929, para. 45.

17/ A/3764 and Add.1 (1957), para. 47.

18/ See A/C.3/SR.779 (1957), para. 14.

19/ See A.P.M. Coomans, De Internationale Bescherming van het Recht op Onderwijs (The International Protection of the Right to Education), Leiden, 1992 pp. 38, 39. See also The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (1986), reprinted in E/CN.4/1987/17, principle No. 56.

20/ Compare article 2 (2) of the ICESCR and Limburg principles 35 and 37.

21/ See article 1 (1) of the UNESCO Convention against Discrimination in Education for a definition of the term "discrimination in education". In 1996, the Kuwaiti Parliament adopted a bill which provided for the segregation of male and female students in higher educational institutions. In my view, this segregation will lead to discrimination against women, given the influence of Muslim fundamentalist groups in that country. See the Dutch daily newspaper NRC Handelsblad, 3 July 1996.

22/ The conclusions of the 1989 Fribourg Human Rights Colloquium stipulate that "the right to read and write, with respect for cultural identity, forms part of the core both of the right to education and of the right to information; it is guaranteed, as a minimum, by the right to free and compulsory primary education". In: P. Meyer-Bisch (ed.), *Le noyau intangible des droits de l'homme*, Actes du VIIe Colloque interdisciplinaire sur les droits de l'homme à l'Université de Fribourg, (23-25 novembre 1989), Fribourg 1991, p. 241.

23/ See Coomans, op. cit., pp. 39, 238.

24/ In *Kjeldsen, Busk Madsen and Pedersen*, the European Court of Human Rights emphasized that article 2 of Protocol should be interpreted in the light of article 8 (right to privacy), article 9 (freedom of conscience and religion) and article 10 (freedom to receive information) of the European Convention on Human Rights. Judgement, pp. 26, 27.

25/ Compare article 17 (3) of the African Charter on Human Rights and Peoples' Rights which states: "The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State".

26/ *Belgian Linguistic Case*, op. cit., p. 31.

27/ Compare the critical observations of the Committee on Economic, Social and Cultural Rights when it discussed the periodic report of Mauritius on the implementation of the ICESCR. The Committee noted with concern that Kreol and Bhojpuri, the only languages spoken by the large majority of the population, are not used in the Mauritian educational system (E/C.12/1994/8, para. 16).

28/ See, for example, article 27 of the International Covenant on Civil and Political Rights, paragraphs 32-34 of the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (1990), and article 4 of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. See also, within the context of the Council of Europe, article 8 of the European Charter for Regional or Minority Languages (1992) and articles 12-14 of the Framework Convention for the Protection of National Minorities (1994).

29/ Permanent Court of International Justice, *Minority Schools in Albania*, Advisory Opinion of 6 April 1935, Series A/B No. 64. Text in: Hudson, World Court Reports, vol. 3 (1938), pp. 499, 496. For a recent example, see the observations of the Committee on Economic, Social and Cultural Rights concerning the realization of the right to education of members of the Gypsy minority in Romania. The Committee noted that the

Gypsies continued to face discrimination in schools. The Committee recommended the Romanian Government adopt an active non-discrimination policy with respect to this minority, to encourage their participation in cultural life and to assure proper participation in educational activities by children belonging to that group (E/C.12/1994/4, paras. 12, 15).

30/ The UNESCO complaints procedure established in 1978 deals, inter alia, with alleged violations of the right to education. Due to the confidential nature of this procedure, and consequently the lack of information about the substance of complaints, it is, unfortunately, of little help for the purpose of the present study. See, concerning this procedure, D. Weissbrodt and R. Farley, "The UNESCO Human Rights Procedure: An Evaluation", *Human Rights Quarterly*, vol. 16, 1994, pp. 391-415.

31/ Audrey R. Chapman, "A Violations Approach for Monitoring the International Covenant on Economic, Social and Cultural Rights", *Human Rights Quarterly*, vol. 18, 1996, pp. 23-66.

32/ Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, published in the *Netherlands Quarterly of Human Rights*, vol. 15, 1997, pp. 244-252. For other examples, see my contribution "Identifying Violations of the Right to Education", in T.C. van Boven, C. Flinterman and I. Westendorp (eds.), *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, Utrecht, Netherlands Institute of Human Rights, SIM Special No. 20, 1998, pp. 125-146.

33/ See Report of the Ad Hoc Working Group of Experts on Southern Africa, (E/CN.4/1989/8), paras. 399-413.

34/ See C.D. Ammoun, Study of Discrimination in Education (United Nations publication, Sales No. E.57.XIV.3), pp. 4, 5.

35/ Article 3 lists the measures required:

"(a) To abrogate any statutory provisions and any administrative instructions and to discontinue any administrative practices which involve discrimination in education;

"(b) To ensure, by legislation where necessary, that there is no discrimination in the admission of pupils to educational institutions;

"(c) Not to allow any differences of treatment by the public authorities between nationals, except on the basis of merit or need, in the matter of school fees and the grant of scholarships or other forms of assistance to pupils and necessary permits and facilities for the pursuit of studies in foreign countries;

"(d) Not to allow, in any form of assistance granted by the public authorities to educational institutions, any restrictions or preference based solely on the ground that pupils belong to a particular group;

"(e) To give foreign nationals resident within their territory the same access to education as that given to their own nationals."

For an analysis of this Convention, see W. McKean, *Equality and Discrimination under International Law*, Oxford University Press, 1985, pp. 128-135.

36/ See Limburg Principle Nos. 35, 37. See also CESCR, general comment No. 3 (HRI/GEN/1/Rev.3), para. 1.

37/ See the concluding observations of the CESCR on Morocco (E/C.12/1994/5, para. 24), Iraq (E/C.12/1994/6, paras. 9, 17 and Guinea (E/C.12/1/Add.5, para. 23).

38/ According to a directive of the Iranian Supreme Cultural Council of the Revolution, Bahai's should be expelled from the universities, either at the time of the admission procedure, or during their studies, as soon as it becomes apparent that they are Bahai's. Report of Mr. A. Amor, Special Rapporteur on religious intolerance (E/CN.4/1996/95/Add.2), para. 63. See also the concluding observations of the Committee on Iran (E/C.12/1993/7).

39/ Concluding observations on Romania (E/C.12/1994/4), paras. 12, 15, 16.

40/ Concluding observations on the United Kingdom of Great Britain and Northern Ireland (Hong Kong) (E/C.12/1994/19), para. 28.

41/ See Fons Coomans, "Clarifying the core elements of the right to education", in F. Coomans and F. van Hoof (eds.), *The Right to Complain about Economic, Social and Cultural Rights*, Utrecht, Netherlands Institute of Human Rights, SIM Special No. 18, 1995, p. 14.

42/ See P. Alston, "The International Covenant on Economic, Social and Cultural Rights", in Manual on Human Rights Reporting, United Nations publication, Sales No. GE.E.97.O.16, pp. 147-148.

43/ General Comment No. 3, para. 10.

44/ Compare Limburg Principle Nos. 25 and 28.

45/ E/CN.4/1996/66, para. 109.

46/ Additional information submitted by States parties to the Covenant (E/1989/5), pp. 9-10 (Zaire).

47/ E/1982/3/Add.41.

48/ CESCR, Report on the second session (8-25 February 1988), Official Records of the Economic and Social Council, Supplement No. 4, (E/1988/14-E/C.12/1998/4), para. 297.

49/ E/C.12/1988/SR.19, para. 10.

50/ Concluding observations on Kenya (E/C.12/1993/6), para. 18. See also the concluding observations on Zimbabwe (E/C.12/1/Add.12), para. 14.

51/ Report on the human rights situation in Haiti by Mr. Adama Dieng, independent expert (E/CN.4/1996/94), para. 71; CESCR, Concluding observations on Mexico (E/C.12/1993/16), para. 7; CESCR, Concluding observations on Mali (E/C.12/1994/17), para. 15; CESCR, Concluding observations on the Russian Federation (E/C.12/1/Add.13), paras. 29, 43; Report on the human rights situation in the Republic of Equatorial Guinea by Mr. Alejandra Artucio, Special Rapporteur (E/CN.4/1996/67), para. 66.

52/ Compare General Comment No. 22 (1993) on article 18 of the International Covenant on Civil and Political Rights adopted by the Human Rights Committee (HRI/GEN/1/Rev.3). The Committee noted "that public education that includes instruction in a particular religion or belief is inconsistent with article 18 (4) unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians" (para. 6).

53/ See E/C.12/1990/SR.45, para. 10. See also the report by the Special Rapporteur on religious intolerance, Mr. Amor (E/CN.4/1996/95/Add.2).

54/ See E/C.12/1990/SR.42, para. 50.

55/ One member of the CESCR observed: "If 98 per cent of the population was Muslim and favoured religious instruction, that was well and good. The Committee's task, however, was to ascertain whether the right of the remaining 2 per cent of the population to have instruction in another religion, or to have no religious instruction at all, was being safeguarded" (E/C.12/1990/SR.43, para. 38).

56/ See the comments made by B. Simma, in Coomans and van Hoof (eds.), op. cit. p. 29.

57/ See supplementary information submitted by the Government of Zaire (E/1989/5).

58/ See also General Comment No. 22 adopted by the Human Rights Committee, para. 6, op. cit.

59/ A. Eide, Right to Adequate Food as a Human Right, Human Rights Study Series 1 (United Nations publication, Sales No. E.89.XIV.2), paras. 66-71.

60/ Ibid., fig. 1.

61/ See Coomans, op. cit., pp. 231, 232 and M. Nowak, "The Right to Education - Its Meaning, Significance and Limitations", in *Netherlands Quarterly of Human Rights*, vol. 9, 1991, pp. 421, 422.

62/ See the Limburg Principle, No. 17. Legislative measures would be imperative if existing legislation is contrary to the obligations under the Covenant; see Limburg Principle, No. 18.

63/ Maastricht Guidelines, para. 9.

64/ Reference should also be made to the Protocol of San Salvador to the American Convention on Human Rights (not yet in force) which provides in article 19 (6) that any instance in which, inter alia, the right to education (art. 13) is violated by action directly attributable to a State party may give rise to application of the system of individual petitions of the American Convention on Human Rights. See further on this Protocol A.A. Cançado Trindade, "La Protection des droits économiques, sociaux et culturels", in *Revue générale de droit international public*, Tome 94, 1990, pp. 913-946.

65/ See C. Scott, "The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights", *Osgoode Hall Law Journal*, vol. 27, 1989, p. 839.

66/ See M.C.R. Craven, "The Domestic Application of the International Covenant on Economic, Social and Cultural Rights", *Netherlands International Law Review*, vol. XL, 1993, p. 376.

67/ Para. 5. The Committee adds: "Any suggestion that the provisions indicated are inherently non-self-executing would seem to be difficult to sustain". See also Limburg Principle, No. 8.

68/ E/C.12/1993/3/Rev.1, p. 10.

69/ Ibid., p. 8.

70/ Limburg Principle, Nos. 35, 37.

71/ Limburg Principle, No. 38.

72/ See Coomans, op. cit., pp. 200-203.

73/ Committee on Economic, Social and Cultural Rights, General Comment No. 1 (1989), para. 4, in HRI/GEN/1/Rev.3.

74/ Limburg Principle, No. 16. The Committee on Economic, Social and Cultural Rights is very critical about the absence of compulsory primary education, the low school attendance of children or the failure to realize free primary education in States parties. The Committee noted that the obligation of article 13 (2)(a) applies in all situations including those in which local communities are unable to furnish buildings, or individuals are unable to afford any costs associated with attendance at school. See the concluding observations on Kenya (E/C.12/1993/6), para. 18 and The Gambia, (E/C.12/1994/9), para. 17.

75/ Compare Limburg Principle, No. 28.

APPENDIX

Analysis of State obligations relating to the right to education

Dimensions of the right to education / Level of State obligations	Social dimension		Freedom dimension	
	Accessibility	Availability	Liberty to choose	Liberty to establish
TO RESPECT	Respect free access to public education both in legislation, policy and practice without discrimination (core).	Respect education in minority languages.	Respect religious and philosophical convictions (granting exemption). Respect freedom of school choice. Respect human dignity. Respect teaching in minority languages (core).	Respect free establishment of private schools (subject to legal minimum standards) (core). Respect (cultural) diversity in education.
TO PROTECT	Apply and uphold equal access to education in legislation, policy and practice against violations by third persons (parents, employers). Establish legislation against child labour.	Regulate recognition of diplomas and educational institutions.	Eliminate indoctrination or coercion by others. Protect legally freedom to choose (core). Combat discrimination in the admission of students to private institutions. Guarantee pluralism in the curriculum.	Apply and uphold the principle of equality. Protect legally private teacher training institutions and diplomas.
TO FULFIL	Take positive measures for groups with an educational backlog (e.g. minorities, migrants, refugees, the socially vulnerable, detainees). Eliminate passive discrimination. Introduce progressively free education. Promote a fellowship system.	Make primary education compulsory and free (core). Train teachers. Make transportation facilities and teaching materials available. Combat illiteracy. Promote adult education. Maintain educational services and quality.	Encourage pluralism in the curriculum. Promote intercultural education.	Provide financial and material support to institutions of private education on a non-discriminatory basis.